(2)

No. 04-499

IN THE

Supreme Court of the United States

JAE WON JEONG,

Petitioner,

v.

TAIHEIYO CEMENT CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION EIGHT

RESPONDENTS' BRIEF IN OPPOSITION

MATTHEW EDWARD DIGBY
Counsel of Record
HEIDI A. LEIDER
BINGHAM MCCUTCHEN LLP
355 South Grand Avenue, Suite 4400
Los Angeles, CA 90071-3106
(213) 680-6400

Counsel for Respondents Taiheiyo Cement Corporation, Taiheiyo Cement U.S.A., Inc., California Portland Cement Co., Glacier Northwest, Inc. (f/k/a Lone Star Northwest, Inc.)

191530

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether World War II forced labor claims asserted by former Korean nationals under California Code of Civil Procedure § 354.6 are preempted by the United States' exclusive authority over foreign relations and the foreign policy, embodied in Articles 4(a) and 26 of the 1951 Treaty of Peace with Japan, that such claims must be resolved through bilateral negotiations between Japan and Korea, rather than through litigation in state court.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Taiheiyo Cement Corporation has no parent company, and no other publicly held company owns 10% or more of its stock. Taiheiyo Cement U.S.A., Inc., is a wholly owned subsidiary of Taiheiyo Cement Corporation. California Portland Cement Co. and Glacier Northwest, Inc. (f/k/a Lone Star Northwest, Inc.) are wholly owned subsidiaries of Taiheiyo Cement U.S.A., Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
BRIEF OF RESPONDENTS IN OPPOSITION	1
STATEMENT OF THE CASE	3
A. The United States' Resolution of World War II Claims Concerning Japan	3
B. The California World War II Forced Labor Statute	7
C. Jeong's Claims	8
D. Procedural History	9
1. Taiheiyo's Motions for Judgment on the Pleadings	9
2. Taiheiyo's Petition for a Writ of Mandate	10
REASONS FOR DENYING THE PETITION	12
I. The Petition Should Be Denied Because There Is No Conflict To Resolve	12

Contents

Page

II. The Petition Should Be Denied Because *Garamendi* Resolves All Of Petitioner's Arguments 14

A. *Garamendi* 14

B. *Garamendi* Controls 16

1. The Foreign Policy Embodied In The Treaty 17

2. The Executive's Interpretation Of The Treaty 18

3. Balancing State Interests 22

III. Alternative Grounds For Dismissal Make Certiorari Inappropriate 24

A. Political Question 24

B. Due Process 25

IV. Objections To The Question Presented For Review 26

CONCLUSION 27

TABLE OF CITED AUTHORITIES

Cases *Page*

Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) ... 26

Alperin v. Vatican Bank, 242 F. Supp. 2d 686 (N.D. Cal. 2003) 25

American Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) ..... *passim*

Baker v. Carr, 369 U.S. 186 (1962) 25

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 15, 16

Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999) 7, 25

Deutsch v. Turner Corp., 324 F.3d 692 (9th Cir. 2003) ..... *passim*

Gerling Global Reins. Corp. v. Gallagher, 267 F.3d 1228 (11th Cir. 2001) 25

In re Nazi Era Cases Against German Defendants Litig., 129 F. Supp. 2d 370 (D.N.J. 2001) 25

In re World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939 (N.D. Cal. 2000) 4, 9

Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999) 20, 25

Joo v. Japan, 332 F.3d 679 (D.C. Cir. 2003) .. 4, 5, 14, 20

Cited Authorities

Page

Kelberine v. Societe Internationale, 363 F.2d 989 (D.C. Cir. 1966) 25

Kim v. Ishikawajima Harima Heavy Indus., Ltd., 540 U.S. 820 (2003) 9, 13

Ma v. Kajima Corp., 540 U.S. 820 (2003) 13

Mitsubishi Materials Corp. v. Super. Ct., 113 Cal. App. 4th 55 (2003) 4, 19, 23

Oetjen v. Central Leather Co., 246 U.S. 297 (1918) 24

Saldajeno v. Ishihara Sangyo Kaisha, Ltd., 540 U.S. 821 (2003) 4, 13

Spindulys v. Los Angeles Olympic Organizing Comm., 175 Cal. App. 3d 206 (1985) 25

Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176 (1982) 20, 21

Tenney v. Mitsui & Co., Ltd., 540 U.S. 820 (2003) 4, 13

Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227 (11th Cir. 2004) 25

United States v. Pink, 315 U.S. 203 (1942) 25

Zschernig v. Miller, 389 U.S. 429 (1968) 13, 17

Cited Authorities

Page

Statutes

Alien Tort Claims Act, 28 U.S.C. § 1350 22

Cal. Code Civ. Proc. § 354.6 ..... *passim*

Rules

U.S. Sup. Ct. R. 10(a) 12

U.S. Sup. Ct. R. 10(b) 12

U.S. Sup. Ct. R. 15(2) 26

Treaties

Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Co-operation, June 22, 1965, Japan-Republic of Korea, 583 U.N.T.S. 258 5

Treaty of Peace Between the Republic of China and Japan, April 28, 1952, 138 U.N.T.S. 3 6

Treaty of Peace and Friendship Between Japan and the People's Republic of China, Aug. 12, 1978, 1225 U.N.T.S. 257 6

Treaty of Peace with Japan, Sept. 8, 1951, U.S.-Japan, 3 U.S.T. 3169 ..... *passim*

Page

Other Authorities

Japanese Peace Treaty and Other Treaties Relating to Security in the Pacific, Report of the Committee on Foreign Relations, Sen. Exec. Rep. No. 82-2 (1952) 3

Agreed Minutes to the Agreement on the Settlement of Problem Concerning Property and Claims and on the Economic Co-operation Between Japan and the Republic of Korea, June 22, 1965, 583 U.N.T.S. 290 ..... 5, 6

Joint Communiqué of the Government of Japan and the Government of the People's Republic of China, Sept. 29, 1972 6

BRIEF OF RESPONDENTS IN OPPOSITION

The California Court of Appeal's decision in this case is mandated by *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), and agrees with the Ninth Circuit's holding that World War II forced labor claims identical to those asserted here are barred by the federal government's exclusive authority over foreign relations. *See Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir.), *cert. denied sub nom. Kim v. Ishikawajima Harima Heavy Indus., Ltd.*, 540 U.S. 820 (2003). Because *Garamendi* resolves every issue presented by the Petition, and because there is no conflict among the lower courts for this Court to resolve, the Petition for certiorari should be denied.

The 1951 Treaty of Peace with Japan ("the 1951 Treaty" or "Treaty"), 3 U.S.T. 3169 (App. 134-64), established a framework for the resolution of claims against Japan and its nationals arising out of World War II – including the forced labor claims asserted here by petitioner, a former Korean national. Articles 14 and 19 of the Treaty provided for a mutual waiver of claims by the Allies and Japan and their respective nationals. App. 147, 151-52; *see* n.2, *infra*. The Treaty contemplated that claims by non-signatory nations, such as Korea and China, and their nationals, would be resolved through negotiations between Japan and the affected countries. Article 4(a) mandated that the "claims . . . of [Korean] authorities *and residents* against Japan *and its nationals*, shall be the subject of special arrangements between Japan and [Korean] authorities." App. 136-37 (emphasis added).[1] Article 26 further required Japan "to conclude with any State . . . which is not a signatory of the present Treaty, a bilateral Treaty of Peace" to resolve World War II claims. (App. 155-56).

The California Court of Appeal held that "Articles 4(a) and 26 embody the federal purpose and foreign policy that WWII

1. The Treaty specifically defines the term "nationals" to include "juridical persons," such as respondents. 1951 Treaty, art. 4(a) (App. 137).

claims by individuals of non-signatory nations were to be resolved through diplomacy," *Taiheiyo Cement Corp. v. Super. Ct.*, 117 Cal. App. 4th 380, 392 (2004) (App. 16), thus preempting petitioner's attempt to resolve his forced labor claims through state-court litigation under California's recently enacted World War II forced labor statute. The Court of Appeal's decision was required by *Garamendi*, in which this Court held that a California statute seeking to facilitate the resolution of World War II era insurance claims was preempted by the federal government's foreign affairs powers. 539 U.S. at 401. This Court held that U.S. executive agreements that "embod[ied]" a foreign policy to resolve World War II claims, but that "include[d] no preemption clause," were sufficient to preempt the California law under the federal government's foreign affairs power. *Id.* at 417.

Here, the Court of Appeal correctly recognized that "*Garamendi* compels our conclusion that . . . California's law conflicts with the foreign policy expressed in the 1951 Treaty." *Taiheiyo Cement*, 117 Cal. App. 4th at 398 (App. 26). Indeed, the Court of Appeal found preemption here "even more compelling" than in *Garamendi* itself, because the foreign policy barring petitioner's claims was established by a treaty formally ratified by the Senate, not just by executive agreements, as in *Garamendi*. *Id.* at 397 (App. 24).

The Court of Appeal's decision thus joined the decision of the United States Court of Appeals for the Ninth Circuit in holding California's World War II forced labor statute unconstitutional on foreign affairs grounds. *See Deutsch*, 324 F.3d at 706-16. This Court denied certiorari in *Deutsch*, and it should do so here as well.

Certiorari is also unwarranted because petitioner's claims are barred by other constitutional doctrines not reached by the opinion under review. Among these are the political question doctrine and due process limitations on the extraterritorial application of state law.

For all of these reasons, the Petition should be denied.

STATEMENT OF THE CASE

A. The United States' Resolution of World War II Claims Concerning Japan

In the aftermath of World War II, the United States viewed a "free, prosperous and democratic Japan" as "an important stabilizing influence in the Far East" in the face of "[mounting] international tensions" in that region. *Japanese Peace Treaty and Other Treaties Relating to Security in the Pacific, Report of the Committee on Foreign Relations*, Sen. Exec. Rep. No. 82-2 (1952) (hereinafter "Sen. Exec. Rep. No. 82-2"), at 2.

One of the most difficult questions confronting the negotiators of the 1951 Treaty was the issue of reparations – not only for the Allies and their nationals, but for Korea and China and their nationals. Potential Allied claims against Japan amounted to more than $100 billion in 1952 dollars. *See id.* at 13. In the Senate Foreign Relations Committee's view, "It would obviously be impossible for Japan to pay more than a very small fraction of such a huge amount." *Id.*; *see also* 1951 Treaty, art. 14(a) (App. 144) (recognizing "that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damages and suffering and at the same time meet its other obligations").

In the 1951 Treaty, the United States and the other Allied Powers established a framework for the resolution of claims arising out of the events of World War II in the Pacific. In so doing, the United States adhered to the principle that "reparations for war losses is a . . . matter *to be settled between governments*" and that "it is the . . . responsibility of each government to provide such compensation for persons under its protection as that government deems fair and equitable . . . out of reparations that may be received from Japan or from other sources." Sen. Exec. Report No. 82-2 at 13 (emphasis added).

As to signatories, including the United States, the 1951 Treaty provided specified reparations and waived all further claims of the Allies and their nationals against Japan and its nationals arising out of actions taken in the course of the prosecution of the war. 1951 Treaty, articles 14-19, (App. 144-47, 151-52).[2]

As to non-signatories, the 1951 Treaty established a framework for the resolution of war claims through bilateral negotiations between Japan and the affected nations. *See generally Joo v. Japan*, 332 F.3d 679, 685 (D.C. Cir. 2003), *vacated on other grounds*, 124 S. Ct. 2835 (2004). Principal among the non-signatories was Korea, which was not a signatory to the 1951 Treaty because, as part of the Empire of Japan until the end of World War II, it had not been at war with Japan. Tab 32 at 1783, 1785.[3] Nonetheless, the Treaty negotiators inserted several provisions intended to address the post-war issues outstanding between Korea and Japan, including compensation for Korea and its nationals. Article 21 of the 1951 Treaty gave Korea the benefits of Articles 2, 4, 9 and 12 of the Treaty, which dealt with the recognition of Korean independence, the right of Korean authorities to seize all Japanese-owned assets in Korea, and the right of Korea to obtain

---

2. The waiver of Allied and Allied nationals' claims against Japan and its nationals is discussed extensively in *Mitsubishi Materials Corp. v. Super. Ct.*, 113 Cal. App. 4th 55 (2003), *In re World War II Era Japanese Forced Labor Litig.*, 114 F. Supp. 2d 939 (N.D. Cal. 2000), *aff'd sub nom. Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir.), *cert. denied sub nom. Tenney v. Mitsui & Co., Ltd.*, 540 U.S. 820 (2003), and *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1153 (N.D. Cal. 2001), *aff'd sub nom. Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir.), *cert. denied sub nom. Saldajeno v. Ishihara Sangyo Kaisha, Ltd.*, 540 U.S. 821 (2003).

3. Tab references are to the Appendix of Exhibits in Support of Petition for Writ of Mandate, Prohibition or Other Appropriate Relief, filed in the California Court of Appeal.

certain economic agreements on a most-favored-nation basis, as well as other commercial rights. (App. 135-37, 140-43, 153).

In return, Article 4(a) provided that the "claims . . . of [Korean] authorities and residents against Japan and its nationals, *shall be the subject of special arrangements* between Japan and [Korean] authorities." (App. 136-37) (emphasis added).

Similarly, the 1951 Treaty established a framework for post-war relations between Japan and China. Article 21 of the Treaty gave China the benefits of Articles 10 and 14(a)(2), entitling China to seize all property of Japan and Japanese businesses located in China, and providing for Japan's renunciation of any claim to Chinese territory. (App. 141, 145-47, 153). Article 26 obligated Japan to conclude a treaty with China "on the same or substantially the same terms" as the 1951 Treaty (App. 155-56), that is, one that would resolve the claims of China and its nationals just as the 1951 Treaty had for the Allies and their nationals.

These provisions of the 1951 Treaty established, as a matter of U.S. foreign policy, that the World War II claims of Korea, China and their nationals were to be resolved "through government-to-government negotiation." *Joo*, 332 F.3d at 685.

The framework established by the 1951 Treaty was in large part a success, resulting in the negotiated settlement of the World War II claims of the Republic of Korea (South Korea), the Republic of China (Taiwan), the People's Republic of China (China), and their respective nationals.

Japan and South Korea entered into a war claims settlement in 1965. *See* Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Co-operation, June 22, 1965, Japan-Republic of Korea, 583 U.N.T.S. 258 ("Claims Treaty"), Tab 7 at 315. The Claims Treaty "settled completely and finally" all claims of South Korea and

Japan "and their nationals" including, but not limited to, "those provided for in Article IV, paragraph (a) of the [1951 Treaty]," (*id.*, art. 2 ¶ 1, 583 U.N.T.S. at 260, Tab 7 at 318) and also including "any claim falling within the scope of the 'Outline of the Claims of the Republic of Korea against Japan' (the so-called 'Eight Items')." Agreed Minutes to the Agreement on the Settlement of Problem Concerning Property and Claims and on the Economic Co-operation Between Japan and the Republic of Korea, June 22, 1965, para. 2(g), 583 U.N.T.S. 290, 292, Tab 7 at 350. The Eight Items, in turn, specifically include "[c]laims by Koreans against Japanese nationals or corporations" and the claims of "Korean draftees," such as petitioner. Tab 7 at 370.

Pursuant to Article 26 of the 1951 Treaty, Japan concluded agreements with Taiwan in 1952[4] and with China in 1972 and 1978,[5] which similarly resolved the wartime claims of those

4. *See* Treaty of Peace Between the Republic of China and Japan, April 28, 1952, 138 U.N.T.S. 3, 38 (the "ROC Treaty"). The ROC Treaty incorporated the "relevant provisions" of the 1951 Treaty as the rule by which "any problem" between the signatories resulting from "the existence of a state of war" "shall be settled," unless the ROC Treaty, or its supplementary documents, provided otherwise. *Id.*, art. XI, 138 U.N.T.S. at 42. Because Article 14 of the 1951 Treaty deals with a problem resulting from the war – the settlement of war claims against Japan and its nationals – Article XI incorporates Article 14's provisions and resolves the claims of the ROC and its nationals, including war-time forced labor claims.

5. In 1972, Japan and the People's Republic of China ("PRC") issued a Joint Communiqué in which the PRC "renounce[d] its demand for war reparation from Japan." Joint Communiqué of the Government of Japan and the Government of the People's Republic of China, Sept. 29, 1972, para. 5, *available at* <www.taiwandocuments.org/japan01.htm>. In 1978 Japan and the PRC formalized their relations in the Treaty of Peace and Friendship Between Japan and the People's Republic of China, Aug. 12, 1978, 1225 U.N.T.S. 257, 269 (the "PRC Treaty"), incorporating and reaffirming the terms of the Joint (Cont'd)

countries and their nationals. As to North Korea, the negotiations contemplated by Article 4(a) remain unresolved and are ongoing.[6]

B. The California World War II Forced Labor Statute

In 1999, California enacted a statute that permits World War II forced and slave laborers to sue those companies for which they were forced to work to benefit the Axis Powers' war effort. *See* Cal. Code Civ. Proc. § 354.6 (hereinafter cited as "§ 354.6") (App. 131-32). The statute provides that any "Second World War forced labor victim" or "Second World War slave labor victim," or their heirs, "may bring an action to recover compensation" for their labor. § 354.6(b) (App. 132). Forced and slave labor victims are defined as people forced to perform labor without pay by the "Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers," between 1929 and 1945. § 354.6(a)(1) & (2) (App, 131). The statute creates and defines the recoverable compensation based on market value plus compounded interest computed without diminution due to "wartime or postwar currency devaluation." § 354.6(a)(3) (App. 131-32). The statute provides that an "action brought under this section" shall not

---

(Cont'd)
Communiqué, which included the renunciation of "reparation[s]." The PRC Treaty thus resolved the forced labor claims of PRC nationals. *See generally Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 275 (D.N.J. 1999) (under international law, "reparations" include individuals' war-time forced labor claims against governments and private businesses).

6. *See* The Views of the Government of Japan on the Lawsuits against Japanese Companies by the Nationals of Countries Not Being Parties to the San Francisco Peace Treaty, Tab 32 at 1785 ("The Government of Japan has conducted normalization talks with North Korea eight times from 1991 to 1992 and already three times after the resumption of the negotiations in April 2000.").

be dismissed on statute of limitations grounds if it is filed by December 31, 2010. § 354.6(c) (App. 132).

C. Jeong's Claims

Petitioner Jae Won Jeong asserts causes of action under Section 354.6, and for unjust enrichment, injury in tort and unfair business practices. Tab 1 at 15-18.[7] Jeong, now a United States citizen, alleges that he was a Korean college student in Tokyo in 1943. Tab 1 at 11-12. He alleges that when he refused the Japanese government's order that he and other students report to the Japanese military for service, he was detained by the Japanese police and later sent to Korea. Tab 1 at 12. Once in Korea, he was allegedly imprisoned by the Japanese "colonial" government, and sent to a camp run by the government for "[v]olunteer [s]oldier [t]raining." Tab 1 at 12-13.

Jeong alleges that in 1944, he was transferred by government authorities to a cement factory in Korea, which was operated "by and for the benefit of the Japanese Onoda Cement Manufacturing Company under the color of the Japanese authority." Tab 1 at 13. He alleges that "World War II imposed great demands on the Japanese industry, which suffered from an acute shortage of workers," leading the Japanese government to set up programs using "Korean nationals and Allied prisoners" to perform forced labor. Tab 1 at 14. This was to "benefit[] the Japanese war effort." *Id.* Jeong alleges that while at the factory, he and other workers performed "hard physical labor," for which they were allegedly not paid. Tab 1 at 13. Jeong sued respondents (collectively, "Taiheiyo"), alleging that they are successors to Onoda.

---

7. The Court of Appeal held Jeong's claims other than his cause of action under Section 354.6 time-barred on state-law grounds. *See Taiheiyo Cement*, 117 Cal. App. 4th at 398 n.10 (App. 26). The Petition does not seek review of that holding.

D. Procedural History

1. Taiheiyo's Motions for Judgment on the Pleadings

Taiheiyo moved for judgment on the pleadings, on the grounds that the 1951 Treaty, the 1965 Japan-Korea Claims Treaty, and the political question doctrine bar Jeong's claims. Tab 5. The Superior Court denied the motion. App. 85-104. Taiheiyo then filed a second motion for judgment on the pleadings, on the grounds that Section 354.6 is an unconstitutional interference with the federal government's exclusive authority over foreign relations,[8] and that due process forbids the extraterritorial application of California law to Jeong's claims, which arose in East Asia during World War II. Tab 22.

The United States filed a Statement of Interest in support of Taiheiyo's second motion for judgment on the pleadings. The United States explained that Section 354.6 "is unconstitutional because it impermissibly interferes with the United States' exercise of its foreign policy powers and conflicts with international obligations entered into by this nation at the close of World War II." Tab 32 at 1690. The government explained that the 1951 Treaty "establish[ed] a diplomatic framework for the resolution of claims by non-party nations," Tab 32 at 1698, and that "[i]n entering into the Treaty, the President and the Senate clearly did not intend to leave any jurisdiction over war claims or reparations to the States." Tab 32 at 1699.

The Superior Court denied Taiheiyo's second motion for judgment on the pleadings, concluding that Section 354.6 was constitutional because it had no direct impact on foreign

---

8. Taiheiyo's second motion cited an intervening federal district court decision that held Section 354.6 unconstitutional on foreign affairs grounds. *See In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160 (N.D. Cal. 2001), *aff'd sub nom. Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir.), *cert. denied sub nom. Kim v. Ishikawajima Harima Heavy Indus., Ltd.*, 540 U.S. 820 (2003).

relations, and that due process did not bar the application of Section 354.6 to Jeong's claims. (App. 71-84).

2. Taiheiyo's Petition for a Writ of Mandate

Taiheiyo petitioned for a writ of mandate in the California Court of Appeal. The United States filed an amicus brief in support of Taiheiyo's petition. The United States argued that Jeong's claims under Section 354.6 are barred by the foreign policy embodied in Articles 4(a) and 26 of the 1951 Treaty that "both Korea and China were expected to settle, as the Allied powers had, the war-related claims of themselves and their nationals against Japan and its nationals." Brief of the United States as Amicus Curiae in Support of Petitioners (dated Feb. 11, 2002), at 21. The government explained that "California's forced labor statute" is preempted because it "runs directly contrary to the United States' foreign policy of relegating the war-related claims of Korean and Chinese nationals to inter-governmental resolution." *Id.* The United States also argued that the extraterritorial application California law to Jeong's claims would violate due process. *Id.* at 35-40.

In its first opinion, the Court of Appeal acknowledged that "[t]he 1951 Treaty . . . provides that claims between Korean and Japanese nationals were to be the subject of separate arrangements between the two countries." *Taiheiyo Cement Corp. v. Super. Ct.*, 129 Cal. Rptr. 2d 451, 459 (Ct. App. 2d Dist. 2003) (App. 42). Nonetheless, the court held that Jeong's claims could proceed because "[n]othing in . . . the 1951 Treaty *expressly preempts* or bars claims by Korean nationals against Japanese corporations." *Id.* at 458 (App. 42) (emphasis added). The court also held that Section 354.6 does not unconstitutionally infringe on the federal government exclusive authority to regulate foreign relations, and it rejected Taiheiyo's political question and due process arguments. *Id.* at 465-72 (App. 47-69).

The California Supreme Court granted Taiheiyo's petition for review. *Taiheiyo Cement Corp. v. Super. Ct.*, 66 P.3d 1231, 133 Cal. Rptr. 2d 147 (Cal. 2003). While review was pending, this Court issued its decision in *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). *Garamendi* held that a California statute seeking to facilitate the resolution of World War II era insurance claims was preempted by the federal government's foreign affairs powers. *Id.* at 413-26. This Court held that U.S. executive agreements that "embod[ied]" a foreign policy to resolve World War II claims, but that "include[d] no preemption clause," were sufficient to preempt the California law under the federal government's foreign affairs power, *id.* at 417, and the Court specifically upheld the power of the federal government "to settle claims against foreign corporations associated with wartime experience." *Id.* at 416.

In the wake of *Garamendi*, the California Supreme Court vacated the Court of Appeal's first opinion and transferred the case back to the Court of Appeal for reconsideration in light of *Garamendi*. *Taiheiyo Cement Corp. v. Super. Ct.*, 77 P.3d 2, 5 Cal. Rptr. 3d 31 (Cal. 2003). Following transfer, the United States filed another amicus brief in support of Taiheiyo, arguing that Jeong's forced labor claims were clearly barred under *Garamendi*. *See* Supplemental Brief of the United States as Amicus Curiae in Support of Petitioners (dated Oct. 24, 2003).

In its second opinion, the Court of Appeal agreed that *Garamendi* controls and requires Jeong's lawsuit to be dismissed: "*Garamendi* . . . compels us to conclude section 354.6 is unconstitutional." *Taiheiyo Cement Corp. v. Super. Ct.*, 117 Cal. App. 4th 380, 387 (2004) (App. 6); *see also id.* at 400 (Rubin, J., concurring) (App. 30) ("we must" grant Taiheiyo's writ petition "under *Garamendi*'s compulsion"). The Court of Appeal held that "similar to the executive agreements in *Garamendi*, Articles 4(a) and 26 [of the 1951 Treaty] embody the federal purpose and foreign policy that WWII claims by individuals of non-signatory nations were to be resolved through

diplomacy." *Id.* at 392 (App. 16). Thus, under the reasoning of *Garamendi*, "the treaty preempts section 354.6" because allowing the claims of "WWII slave or forced labor victims to be resolved in court . . . conflicts with the foreign policy expressed in the 1951 Treaty." *Id.* at 398 (App. 26).

The California Supreme Court denied review. (App. 130).

REASONS FOR DENYING THE PETITION

I. THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT TO RESOLVE

The Court of Appeal in this case agreed with the Ninth Circuit's holding in *Deutsch* that World War II forced labor claims under Section 354.6 are barred by the federal government's exclusive authority over foreign relations as embodied in the 1951 Treaty. These decisions are binding precedent on every state and federal trial court in California, and Section 354.6 exists nowhere else. There is no conflict that warrants this Court's review. *See* Supreme Ct. R. 10(a), (b).

Deutsch upheld the dismissal of 29 World War II forced labor cases, all asserting claims under Section 354.6, including claims by former Korean nationals identical to those asserted here. *Deutsch*, 324 F.3d at 708-16. Anticipating this Court's decision in *Garamendi*, the Ninth Circuit followed the long-standing "constitutional principle that power over foreign affairs is reserved to the federal government." *Id.* at 709. The court observed that at the very core of the foreign affairs power lies "the power of the federal government to make and to resolve war, including the power to establish the procedure for resolving war claims." *Id.* at 711. In the context of World War II, the United States exercised that power as to Japan in the 1951 Treaty of Peace, which established "the federal government's resolution of disputes relating to the war." *Id.* at 714. The court explained

that the Treaty bars World War II forced labor claims by plaintiffs of countries signatory and non-signatory alike:

> It is immaterial that many of the Appellants are nationals of two nations, China and Korea, that were not signatories of the San Francisco treaty. When the United States has been a party to a war, the resolution it establishes to that war is the resolution for the whole of the United States. States lack the power to modify that resolution, regardless of the citizenship of those seeking redress.

Id. at 714 n.14.

Four months after this Court issued its decision in *Garamendi*, it denied all of the petitions for certiorari in *Deutsch*. *See Kim v. Ishikawajima Harima Heavy Indus., Ltd.*, 540 U.S. 820 (2003) (denying certiorari); *Tenney v. Mitsui & Co., Ltd.*, 540 U.S. 820 (2003) (same); *Ma v. Kajima Corp.*, 540 U.S. 820 (2003) (same); *Saldajeno v. Ishihara Sangyo Kaisha, Ltd.*,, 540 U.S. 821 (2003) (same).

The California Court of Appeal's decision in this case accords with *Deutsch* and follows *Garamendi*. The Court of Appeal recognized the federal government's exclusive authority over foreign relations, as recently reaffirmed by *Garamendi*. *See Taiheiyo Cement*, 117 Cal. App. 4th at 388-90 (App. 9-12); *see also Zschernig v. Miller*, 389 U.S. 429 (1968). It agreed that the 1951 Treaty established the resolution of World War II claims against Japan and its nationals, *id.* at 390-94 (App. 13-19), and it held that Jeong's forced labor claim under Section 354.6 was preempted by "th[is] expression of federal policy embodied in the 1951 Treaty." *Id.* at 395 (App. 20).

The Court of Appeal's decision also agreed with the D.C. Circuit Court of Appeals in its analysis of the application of the 1951 Treaty to the World War II claims of non-signatory nationals, specifically former Korean nationals. *See id.* at 393-

94 (App. 18-19) (quoting *Joo v. Japan*, 332 F.3d 679, 681, 684-85 (D.C. Cir. 2003), *vacated on other grounds*, 124 S. Ct. 2835 (2004)). *Joo v. Japan* similarly held that Articles 4(a) and 26 of the 1951 Treaty "expressed a clear policy of resolving the claims of [non-signatory] nationals through government-to-government negotiation." 332 F.3d at 685. Thus, there is no conflict over the meaning of the 1951 Treaty.

The Petition does not contend there is a conflict for this Court to resolve. There is none. The Petition ignores *Deutsch* completely, even though it reached the same holding the California Court of Appeal did here. Ironically, the Petition criticizes the California Court of Appeal for its *agreement* with the D.C. Circuit on the proper interpretation of the 1951 Treaty. *See* Petition at 21 (chiding the Court of Appeal because it "uncritically accepted" the D.C. Circuit's interpretation of the 1951 Treaty).

Because there is no conflict that requires this Court's resolution, the Petition should be denied.

II. THE PETITION SHOULD BE DENIED BECAUSE *GARAMENDI* RESOLVES ALL OF PETITIONER'S ARGUMENTS

The Petition's principal argument is that the Court of Appeal supposedly misinterpreted *Garamendi*. Petitioner could not be more wrong. The Court of Appeal correctly recognized that *Garamendi* "compels" the dismissal of Jeong's Section 354.6 claim, *Taiheiyo Cement*, 117 Cal. App. 4th at 398 (App. 26) – indeed, that preemption in this case "is *far more compelling*" than in *Garamendi* itself. *Id.* at 393 (App. 17) (emphasis added). Because *Garamendi* resolves all of the arguments raised by the Petition, certiorari should be denied.

A. *Garamendi*

Garamendi struck down California's Holocaust Victim Insurance Relief Act ("HVIRA"), holding the statute to be an

unconstitutional intrusion on the federal government's exclusive power over foreign relations. HVIRA "require[d] any insurer doing business in [California] to disclose information about all policies sold in Europe between 1920 and 1945 by the company itself or any one 'related' to it." 539 U.S. at 401. This Court saw a conflict between HVIRA and executive agreements between the United States and Germany, which created a voluntary fund to investigate the status of insurance policies issued to Holocaust victims and to settle claims under those policies. *See id.* at 406-08.

The executive agreements in Garamendi "include[d] no preemption clause," and so the United States and the plaintiffs in *Garamendi* "le[ft] their claim of preemption to rest on asserted interference with the foreign policy those agreements *embody*." *Id.* at 417 (emphasis added).

In holding HVIRA unconstitutional, this Court began its analysis with premises of constitutional law that "are beyond dispute." *Id.* at 413. First, of course, was the federal government's supreme power over foreign relations and the fact:

> that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the "concern for uniformity in this country's dealings with foreign nations" that animated the Constitution's allocation of the foreign relations power to the National government in the first place.

Id. (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964)).

The Court also recognized the undisputed "executive authority to decide what that [foreign] policy should be," including the President's long-standing "authority to make 'executive agreements' with other countries requiring no ratification by the Senate or approval by Congress." *Id.* at 414.

The Court further held that the federal government's traditional authority over foreign relations applied to the claims of private individuals against private companies arising out of actions in wartime: "Vindicating victims injured by acts and omissions of enemy corporations in wartime is thus within the traditional subject matter of foreign policy in which national, not state, interests are overriding, and which the National Government has addressed." *Id.* at 421.

With these premises, the Court held that HVIRA conflicted with U.S. foreign policy as embodied in the executive agreements. The agreements reflected a desire by the U.S. "to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions." *Id.* HVIRA undermined that goal because it imposed a broader disclosure requirement than the executive agreements did and attached a monetary sanction for failing to comply. *Id.* at 423-25.

The Court acknowledged that HVIRA's basic purpose – "obtaining compensation for Holocaust victims" – was "a goal espoused by the National Government as well." *Id.* at 425. Nonetheless, the fact that HVIRA imposed broader requirements than the federal law, with a more severe economic penalty, was sufficient to render the law unconstitutional under the foreign affairs doctrine: "The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves." *Id.* at 427. Accordingly, the Court held HVIRA preempted by the federal government's exclusive authority over foreign relations. *Id.*

B. *Garamendi* Controls

The Court of Appeal was right that *Garamendi* controls. Articles 4(a) and 26 embody the foreign policy "determination that claims of non-signatory nations like Korea, and their nationals, were to be resolved with Japan through government-to-government negotiations." *Taiheiyo Cement*, 117 Cal. App.

4th at 398 (App. 26). Just as HVIRA was preempted because it conflicted with the foreign policy embodied in the executive agreements at issue in *Garamendi*, so too does Section 354.6 "conflict[] with the foreign policy expressed in the 1951 Treaty" by encouraging the litigation of claims in California state courts that the Treaty consigns to diplomatic resolution. *Id.*[9]

Jeong's criticisms of the Court of Appeal's decision are meritless and foreclosed by *Garamendi* itself.

1. The Foreign Policy Embodied In the Treaty

Petitioner acknowledges that Article 4(a) of the 1951 Treaty states that the World War II claims of non-signatory nationals "shall be the subject of special arrangements between Japan and . . . [Korean] authorities." Petition at 17 (quoting Article 4(a)). He does not dispute that his claims fall within Article 4(a). Nor does he deny that litigating his Section 354.6 claim in state court is the antithesis of "special arrangements" arrived at through diplomatic negotiation between Japan and Korea.

Those facts are dispositive. Given the plain language of Article 4(a) – and the obvious incompatibility between resolving a claim through intergovernmental negotiation, on the one hand, or litigation in state court, on the other – Jeong's assertion that

---

9. *Garamendi* also controls for a second reason. In addition to the "conflict" theory of foreign affairs preemption that was the basis for striking down HVIRA, *Garamendi* recognized a "field" preemption theory under *Zschernig v. Miller*, 389 U.S. 429 (1968):

> If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine, whether the National Government had acted and, if it had, without reference to the degree of any conflict.

Garamendi, 539 U.S. at 419 n.11. Here, as the Ninth Circuit properly held, Section 354.6 is also invalid under *Zschernig* "field" preemption. *See Deutsch*, 324 F.3d at 708-16.

the 1951 Treaty does not embody a foreign policy that preempts his claims is meritless.

Jeong's argument that the 1951 Treaty is not quite clear enough in preempting his claims is foreclosed by *Garamendi*. In essence, Jeong argues that it was not sufficient for the President to propose, and the Senate to ratify, a treaty expressly stating that his forced labor claim "shall" be resolved through negotiations between Japan and Korea. Petition at 17. Rather, according to Jeong, the United States was required to also expressly state that the Treaty *preempts* state-law claims that are inconsistent with this diplomatic resolution. Petition at 16-17. That argument, however, is directly contrary to *Garamendi*. *Garamendi* struck down California's HVIRA precisely because it interfered with "the foreign policy those [executive] agreements embody," even though "the agreements *include no preemption clause*." 540 U.S. at 417 (emphasis added).

2. The Executive's Interpretation Of The Treaty

The bulk of the Petition consists of criticisms of the Executive Branch's interpretation of the 1951 Treaty and of the Court of Appeal for supposedly deferring to that interpretation. Jeong accuses the government of being inconsistent in its interpretation of the Treaty; he complains the government's position was created only for litigation; and he asserts that allowing the Executive Branch's interpretation of a treaty to bar his claims would violate "basic principles of separation of powers and federalism" by transferring "authority from the States and Congress to the Executive." Petition at 22.

All of Jeong's arguments ignore the fact that the foreign policy that bars his claims was established in the 1951 Treaty itself, not by unilateral executive action. "After all," the Court of Appeal explained, "rather than unilateral presidential agreements, we are dealing with federal policy expressed through a ratified treaty, the ultimate formal expression of the

federal executive *and legislative* branches in matters of foreign policy." *Taiheiyo Cement*, 117 Cal. App. 4th at 393 (App. 17) (emphasis added); *accord*, *Mitsubishi Materials*, 113 Cal. App. 4th at 79 ("If, in *Garamendi*, the high court would see no constitutional impediment to the *federal executive's* efforts to compromise property claims of civilian Holocaust victims, then a fortiori there can no constitutional impediment where a *treaty* (not just the unilateral efforts of one administration) compromises claims") (emphasis original). That is precisely why preemption in this case "is far more compelling" than in *Garamendi*. *Taiheiyo Cement*, 117 Cal. App. 4th at 393 (App. 17).

It is ironic – indeed, doubly ironic – that Jeong's principal criticism of the Court of Appeal's decision is for its supposedly unwarranted deference to the Executive Branch. There is not a word in the Court of Appeal's opinion that suggests that the Court actually did defer to the Executive in its interpretation of the Treaty. In concluding that the 1951 Treaty embodies a foreign policy that Jeong's claims must be resolved through diplomatic negotiation, rather than litigation, the Court of Appeal cited only the language of the Treaty, other court decisions interpreting the Treaty, and a Senate Executive Report from the time of the Treaty's ratification. *Taiheiyo Cement*, 117 Cal. App. 4th at 390-94 (App. 13-19). Thus, Jeong's insistence that there must be "an independent judicial determination" of what the Treaty means, as opposed to mere deference to the Executive, *see* Petition at 24, is precisely what the Court of Appeal already did.

The second irony in Jeong's critique of deferring to the Executive is that he is really criticizing *Garamendi*, not the Court of Appeal's decision in this case. It was *Garamendi*, after all, that held that executive agreements "requiring no ratification by the Senate or approval by Congress" can preempt state law and "settle [war] claims." 540 U.S. at 415.

In any event, Jeong's criticism of the government is baseless. The federal government has argued throughout this case that Jeong's claims under Section 354.6 are preempted by the foreign policy embodied in the 1951 Treaty. *See, e.g.*, Brief of the United States as Amicus Curiae in Support of Petitioners (dated Feb. 11, 2002), at 20-24. More generally, the United States has consistently advocated for the dismissal of *all* World War II forced labor claims on the ground that they must be resolved through intergovernmental negotiation. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 486 (D.N.J. 1999) ("The executive branch has always taken the position that claims arising out of World War II must be resolved through government-to-government negotiations.").

The United States' position is both correct and entitled to deference. Articles 4(a) and 26 of the 1951 Treaty "expressed a clear policy of resolving the claims of [non-signatory] nationals through government-to-government negotiation," *Joo*, 332 F.3d at 685, and that policy preempts state-law claims under Section 354.6. *Deutsch*, 324 F.3d at 714 n.14. Were there any doubt about the policy expressed in the 1951 Treaty, and there is not, "the meaning attributed to [it] by the Government . . . is entitled to great weight." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982).

The government's position is particularly persuasive in this case because both the United States and Japan agree that state-law claims under Section 354.6 conflict with the policies embodied in the 1951 Treaty. In a formal diplomatic protest to the United States Department of State, the Government of Japan explained that:

> Articles 4(a) and 26 of the Peace Treaty specifically provide that the claims of non-parties to the treaty such as China and Korea and those of their nationals were also to be addressed through government-to-government negotiations, not individual damage claims. However, the State of California established

> a mechanism where any person meeting the criteria set forth in section 354.6 can assert individual claims against Japanese nationals in California. [¶] If upheld, section 354.6 would nullify the provisions of the Peace Treaty. . . .

The Views of the Government of Japan on section 354.6 of Code of Civil Procedure of the State of California ¶¶ 4, 3, attached as exhibit B to the United States' Request for Judicial Notice, dated March 5, 2003. *See Taiheiyo Cement Corp. v. Super. Ct.*, 66 P.3d 1231, 133 Cal. Rptr. 2d 147 (Cal. 2003) (granting this request for judicial notice).

The fact that both the United States and Japan agree that the 1951 Treaty embodies a foreign policy at odds with Section 354.6 – and that the language of the Treaty accords with their mutual interpretation – makes the government's position especially persuasive: "When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation." *Sumitomo Shoji*, 457 U.S. at 185; *see also Garamendi*, 540 U.S. at 424-25 (statements by U.S., German and Swiss governments that California's HVIRA frustrated the operation of the federal executive agreements were evidence that the California law was preempted).

The United States did not assert a contradictory position in the Superior Court, contrary to Jeong's argument. The government has consistently argued that all of Jeong's claims under California law are preempted by the federal government's exclusive authority over foreign relations, as embodied in the 1951 Treaty, and that any claims he might have had under federal law are long since time-barred. *E.g.*, Tab 36 at 1890; Tab 32. There is nothing "inconsistent" or "incoherent" in this position, *see* Petition at 20, and indeed the United States Court of Appeals for the Ninth Circuit agreed with the government. *See Deutsch*, 324 F.3d at 706-18 (holding Section

354.6 unconstitutional on foreign affairs grounds and holding claims under the federal Alien Tort Claims Act, 28 U.S.C. § 1350, time-barred).

3. Balancing State Interests

Jeong next criticizes the Court of Appeal for supposedly failing to balance "the national policy toward non-signatories embodied in the 1951 Treaty" against "California's traditional and powerful interest in administering litigation in its courts." Petition at 25-26. But Jeong is mistaken in claiming that *Garamendi* requires any such balancing. *Garamendi* held that "[t]he express federal policy and the clear conflict raised by the state statute are *alone* enough to require state law to yield." 540 U.S. at 425 (emphasis added). The Court of Appeal followed *Garamendi* and reached the same conclusion here. *Taiheiyo Cement*, 117 Cal. App. 4th at 394-96 (App. 19-22).

Jeong is also wrong in suggesting that the Court of Appeal did not consider the supposed state interests California had in adopting Section 354.6. Jeong contends that "Section 354.6 vindicates the right of individuals to seek redress of individual grievances," Petition at 26, and he argues that there is a "long history of state control of litigation, including litigation that involves disputes affected by war." *Id.* at 27.

Jeong ignores both the Court of Appeal's decision and *Garamendi*. The Court of Appeal acknowledged that Section 354.6 is designed to redress individual grievances, but held that is precisely why it is preempted: Section 354.6, "while noble, conflicts with the federal policy embodied in" the 1951 Treaty that the World War II claims of non-signatory nationals were to be resolved through diplomatic negotiation, not litigation. *Taiheiyo Cement*, 117 Cal. App. 4th at 396 (App. 22); *see also Garamendi*, 540 U.S. at 426-27 (acknowledging the "humanity" of California's interest in redressing the grievances of the estimated 100,000 Holocaust survivors living in the state, but

holding HVIRA preempted because of its "conflict with national policy").

Similarly, Jeong's assertion that states have a generalized ability to enact their own statutes of limitations[10] and interpret contracts with aliens, *see* Petition at 26-27, both ignores the reality of his claims and overstates the Court of Appeal's holding. Jeong is asserting a claim for war reparations. *See Deutsch*, 324 F.3d at 712. His attempt to analogize this lawsuit to a minimum wage claim or some other traditional exercise of the state's police power, *see* Petition at 26, borders on farcical. Section 354.6 does not apply *at all* to conduct that occurred in California or even in the United States. It applies only to forced labor claims in Axis-controlled territory during World War II. § 354.6(a)(1), (2) (App. 131). As *Garamendi* held, "[v]indicating victims injured by acts and omissions of enemy corporations in wartime is thus within the traditional subject matter of *foreign policy* in which national, *not state*, interests are overriding." 540 U.S. at 421 (emphasis added).

Jeong also exaggerates the Court of Appeal's holding. The court did not question, or even address, a state's general ability to provide a forum for aliens to assert claims under

---

10. Jeong's argument takes for its premise that Section 354.6 merely extends the statute of limitations on previously existing World War II claims. In fact, at least one California Court of Appeal, as well as the Ninth Circuit, have held that the statute actually "creates *new* claims that would not otherwise exist." *Mitsubishi Materials*, 113 Cal. App. 4th at 59 (emphasis original); *Deutsch*, 324 F.3d at 707-08. The Court of Appeal in this case found it unnecessary to decide whether Section 354.6 is procedural (as Jeong contends) or substantive (as all other courts have held) because under either interpretation, it "conflicts with the federal policy embodied in Articles 4(a), 14(b), and 26 of the 1951 Treaty" and is preempted. *Taiheiyo Cement*, 117 Cal. App. 4th at 396 (App. 22). Because Jeong's claims are for war reparations, they could never have been brought under state law prior to the adoption of Section 354.6, and the Petition is incorrect in describing the statute as an "extension" on the limitations period for some unspecified, previously nonexistent state-law claim. *See Mitsubishi Materials*, 113 Cal. App. 4th at 59.

international law. Rather, it held that Jeong's claims under Section 354.6 in this case are preempted because they conflict with the foreign policy embodied in the 1951 Treaty. *Taiheiyo Cement*, 117 Cal. App. 4th at 394-96 (App. 19-22).

In sum, the outcome of this case is dictated by *Garamendi*. None of petitioner's arguments warrants review.

III. ALTERNATIVE GROUNDS FOR DISMISSAL MAKE CERTIORARI INAPPROPRIATE

Certiorari is additionally inappropriate because the same outcome – dismissal of this case – is also required by other constitutional doctrines briefed in the courts below and not discussed in the Petition: the political question doctrine and due process limitations on the extraterritorial application of California law.

A. Political Question

Jeong's claims for war-time forced labor against enemy nationals, arising out of Japan's World War II conscription program, would require the courts of California to revisit and revise U.S. foreign policy toward compensation for the harms inflicted by Japan and its nationals during World War II. Any court purporting to undertake this task would place itself in conflict with the nation's foreign policy – which has strived for the resolution of World War II claims through bilateral negotiations, rather than piecemeal litigation – and would necessarily interject itself into an inherently political task, committed exclusively to the political branches of the federal government for resolution.

"The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative – 'the political' – departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); *see generally*

Baker v. Carr, 369 U.S. 186, 210-11 (1962). Following this Court's precedent, numerous courts have held that "forced labor claims arising out of World War II raise nonjusticiable political questions." *Iwanowa*, 67 F. Supp. 2d at 483; *Kelberine v. Societe Internationale*, 363 F.2d 989, 995 (D.C. Cir. 1966); *Alperin v. Vatican Bank*, 242 F. Supp. 2d 686, 690-95 (N.D. Cal. 2003); *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370, 275-84 (D.N.J. 2001); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 272-85 (D.N.J. 1999); *compare Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1235 (11th Cir. 2004) (political question doctrine inapplicable where "the plain text" of federal executive agreements "anticipates that federal courts will consider claims").[11] Jeong's claims are similarly nonjusticiable.[12]

B. Due Process

Jeong's claims are also barred by the Due Process clause. All of his claims are based on California law, but due process forbids the application of California law to events occurring outside of the state between parties that, at the time, had no connection to California. *See Gerling Global Reins. Corp. v. Gallagher*, 267 F.3d 1228, 1238 (11th Cir. 2001).

Here, the conduct at issue is wholly unconnected to California. Jeong's claims arose more than a half-century ago on the other side of the world. Jeong himself had no connection

11. This application of the political question doctrine is binding on California state courts both as a matter of federal law, *see United States v. Pink*, 315 U.S. 203, 222-23 (1942) ("the conduct of foreign relations is committed by the Constitution to the political departments of the *Federal* Government") (emphasis added), and because California itself applies the political question doctrine in state court. *See, e.g., Spindulys v. Los Angeles Olympic Organizing Comm.*, 175 Cal. App. 3d 206, 209-10 (1985).

12. The Court of Appeal's original opinion rejected the political question doctrine, but did not discuss or purport to distinguish any of these precedents. *Taiheiyo Cement*, 129 Cal. Rptr. 2d at 470-72 (App. 66-69).

to California at the time – he was a Korean national (and Japanese subject) resident in Japan. His conscription and forced labor occurred entirely in Japan and what is now North Korea. Jeong does not allege that Taiheiyo's predecessor had any connection with California at the time, or that any of the California-based defendants even existed during World War II. None of the parties could "reasonably have anticipated that their actions would later be judged" by California law. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 327 (1981) (Stevens, J., concurring). Applying California law would be arbitrary and unfair – the hallmark of a denial of due process.[13]

IV. OBJECTIONS TO THE QUESTION PRESENTED FOR REVIEW

Finally, certiorari is inappropriate because the question on which Jeong seeks review is not presented by this case. *See* Supreme Ct. R. 15(2). The Petition seeks review of a California Court of Appeal decision holding preempted "a California law *extending the limitations period* for wartime labor and personal injury claims . . . where *the Treaty itself contains no express preemption*." Petition at i (emphasis added). That "Question Presented" inaccurately describes Section 354.6 and ignores the language of the 1951 Treaty. As noted above, California's Section 354.6 creates a new substantive cause of action for World War II forced labor; it is not merely an extension of the statute of limitations for some unspecified pre-existing claim. *See* n.10, *supra*. Further, Articles 4(a) and 26 do expressly embody a foreign policy that preempts Jeong's claims.

---

13. The Court of Appeal's original opinion rejected Taiheiyo's due process argument on the theory that Section 354.6 is merely an extension of the statute of limitations, and a state may apply its own statute of limitations to claims in its courts, even if the substance of the claims arose out of state. *Taiheiyo Cement*, 129 Cal. Rptr. 2d at 468-70 (App. 60-65). In its second opinion, the Court of Appeal retreated from its holding that Section 354.6 is merely an extension of the statute of limitations, noting instead that two appellate courts have held that it creates a new cause of action. *See* n.10, *supra*.

CONCLUSION

The Petition presents no basis for review. There is no conflict among the lower courts for this Court to resolve. *Garamendi* controls the outcome here, as the California Court of Appeal properly held.

Respectfully submitted,

MATTHEW EDWARD DIGBY
Counsel of Record
HEIDI A. LEIDER
BINGHAM MCCUTCHEN LLP
355 South Grand Avenue, Suite 4400
Los Angeles, CA 90071-3106
(213) 680-6400

Counsel for Respondents
Taiheiyo Cement Corporation,
Taiheiyo Cement U.S.A., Inc.,
California Portland Cement Co.,
Glacier Northwest, Inc.
(f/k/a Lone Star Northwest, Inc.)